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80-1957

NO.

in the Supreme Court of the United States

October Term, 1980

WILLIAM C. SCRIMGEOUR,
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the word "or" in the recantation provision of the federal perjury statute (18 *U.S.C.* §1623) should be given its normal, ordinary disjunctive meaning.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

William C. Scrimgeour respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 12, 1981 and March 16, 1981.

OPINION BELOW

The opinion of the Court of Appeals is reported at 636 F.2d 1019 (5th Cir. 1981) and is reproduced in the Appendix hereto.

JURISDICTION

The original judgment of the Court of Appeals was entered on February 12, 1981. Petitions for rehearing and rehearing *en banc* were denied on March 16, 1981, and reported at 642 F.2d 1210 (5th Cir. 1981). The mandate of the Fifth Circuit was issued on March 26, 1981, a copy of which is reproduced in the Appendix hereto. The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18, Section 1623(d):

> Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, *or* it has not become manifest that such falsity has been or will be exposed.

STATEMENT OF THE CASE

A five-count indictment was returned against the Petitioner, alleging that he made false, material declarations while giving testimony before a federal grand jury, in violation of 18 *U.S.C.* §1623.

Petitioner invoked the recantation provision of the statute (§1623(d)) and claimed the prosecution to be barred. The district court agreed and dismissed the indictment. The district court held that "or" must be read in the disjunctive and not in the conjunctive, *i.e.*, if either of the two conditions of Section 1623(d) is satisfied, recantation bars prosecution.[1]

The Government appealed, pursuant to Title 18, *United States Code*, §3731, from the order of dismissal. The Court of Appeals for the Fifth Circuit reversed and held, *inter alia*, that the word "or" contained in the recantation provision of the federal perjury statute must be given a conjunctive reading notwithstanding the normal disjunctive interpretation normally placed upon the word "or."[2]

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[1]Alternatively, the district court decided that both conditions were satisfied and thus prosecution was barred.

[2]A copy of the Fifth Circuit's opinion is included in the Appendix to this Petition.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES AN IMPORTANT ISSUE OF STATUTORY CONSTRUCTION INVOLVING THE RECANTATION PROVISION OF THE FEDERAL PERJURY STATUTE.

This case presents an important and recurring problem of statutory construction and interpretation. Although our jurisprudence has developed "principles of statutory construction" to aid the ascertainment of legislative will and meaning, these principles are rarely applied uniformly and definitively. The case at bar dramatically illustrates the inconsistent application of statutory construction principles.

The recantation provision of the federal perjury statute (§1623(d)) bars prosecution if, at the time the declarant's admission of falsity is made, "the declaration has not substantially affected the proceeding, *or* it has not become manifest that such falsity has been or will be exposed." The Fifth Circuit, in this case, and the Court of Appeals for the District of Columbia, in *United States v. Moore*, 613 F.2d 1029 (D.C. Cir. 1979), *cert. denied*, ___ U.S. ___, 100 S.Ct. 2922, 64 L.Ed.2d 811 (1980), held that "or" means "and" in §1623(d). So, then, with this *conjunctive* reading, a defendant must satisfy *both* conditions of the provision before recantation is complete. However, oft-cited principles of statutory construction undermines the result reached below.

The wording of subsection (d) is plain, clear, and unambiguous. That being the case, a basic canon of

statutory construction applies: the words of a statute should be interpreted as taking their ordinary and plain meaning. *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199, 204 (1980). A concomitant principle is that the overriding duty of a court when interpreting a statute is to give effect to the intent of the legislature. *Flora v. United States*, 357 U.S. 63, 65, 78 S.Ct. 1079, 1081, 2 L.Ed.2d 1165 (1958); *Philbrook v. Glodgett*, 421 U.S. 707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525, 533 (1975). Moreover, the most important manifestation of legislative intent is the statute's plain language. *United States v. Second National Bank of North Miami*, 502 F.2d 535, 540 (5th Cir. 1974), *cert. denied*, 421 U.S. 912, 95 S.Ct. 1567, 43 L.Ed.2d 777 (1975).

We are further taught that where statutory language is clear and unequivocal, it is not necessary to resort to interpretative devices such as legislative history. This Court has long supported this reluctance to review legislative history when the words of a statute are plain on its face. In *Ex parte Collett*, 337 U.S. 55, 61, 69 S.Ct. 944, 947, 93 L.Ed. 1207, 1211 (1949), this Court declared:

> "Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of §1404(a) but from its legislative history. *The short answer is that there is no need to refer to the legislative history where the statutory language is clear.* The plain word and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly

ambiguous significance, may furnish dubious bases for inference in every direction. *Gemsco, Inc., v. Walling*, 1945, 324 U.S. 244, 260, 65 S.Ct. 605, 89 L.Ed. 921, 933. This canon of construction has received consistent adherence in our decisions."

See also, TVA v. Hill, 437 U.S. 153, 184, 98 S.Ct. 2279, 2296, 57 L.Ed.2d 117 (1978).

Perhaps the best description of the inter-workings of these principles is contained in *American Bankers Insurance Company of Florida v. United States*, 265 F.Supp. 67, 74 (S.D. Fla., 1967), where Judge Atkins explained:

> "There exists in federal statutory construction, as in ordinary speech, a presumption that language is to be given its normal natural and usual meaning, one that is commonly accepted and understood. Where the meaning of a statutory provision is clear, that language is the sole indication of legislative intent. *Courts may not then resort to legislative history to aid in ascertaining Congressional intent. The statute, read with common sense, will be held to mean simply what it says and will be enforced as written.* The consequence of such presumption is to foreclose any inquiry into legislative intent unless the language in question is ambiguous in meaning or subject to more than one reasonable interpretation."

Despite the clear and plain meaning of subsection (d) and those principles of statutory construction discussed above, the court below relied heavily upon legislative history to give a conjunctive meaning to the provision. In so doing, the Fifth Circuit recognized that ". . . the Supreme Court has given somewhat inconsistent instructions concerning the propriety of use of legislative history where the meaning of the words is plain on the face of the statute." 636 F.2d at 1023. There is, indeed, no guidance for the courts below with respect to the use of interpretative devices such as legislative history when, in fact, the words of a statute are plain and clear. This case demonstrates that reviewing courts are free to rely upon interpretative aids beyond the plain words of a statute, which can support a desired interpretation. The danger and pitfalls of such an approach, such as judicial rewriting of statutes, are obvious and this Court can clearly signal its disapproval before it becomes entrenched in our jurisprudence.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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/s/ JOSEPH MINCBERG
JOSEPH MINCBERG

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was served, this 11th day of May, 1981, upon CARL W. MULLIS, III, Attorney, United States Department of Justice, Atlanta, Georgia 30309.

/s/ JOSEPH MINCBERG
JOSEPH MINCBERG

Appendix

UNITED STATES of America,
Plaintiff-Appellant,

v.

William C. SCRIMGEOUR,
Defendant-Appellee.

No. 80-5205.

United States Court of Appeals,
Fifth Circuit.
Unit B

Feb. 12, 1981.

The Government appealed from dismissal by the United States District Court for the Southern District of Florida, William M. Hoeveler, J., of indictment charging defendant with knowingly making false material declarations before a grand jury. The Court of Appeals, Frank M. Johnson, Circuit Judge, held that: (1) evidence indicated that defendant was aware when he recanted that the Government realized that he had testified falsely before the grand jury, and thus recantation statute did not bar his perjury prosecution, and (2) the Government did not deprive defendant of due process of law in permitting him to recant without warning him that his recantation would be to no avail because the Government intended to prosecute him for perjury whether or not he recanted.

Reversed and remanded.

1. Statutes —241(1)

A federal criminal statute should be construed narrowly in order to encompass only that conduct that Congress so intended to criminalize.

2. Statutes —241(1)

Although a criminal statute must be strictly construed, it must not be construed so strictly as to defeat clear intention of the legislature.

3. Statutes —189

Although, in interpretation of statutory language, reference should first be made to plain and literal meaning of the words, overriding duty of a court is to give effect to intent of the legislature.

4. Perjury —15

Recantation bars prosecution for knowingly making false material declarations before grand jury only when defendant has satisfied both conditions of recantation statute, notwithstanding statute's use of word "or" rather than word "and" in describing the conditions. 18 U.S.C.A. §1623(d).

5. Perjury —15

In prosecution for knowingly making false material declarations before a grand jury, evidence indicated

that defendant was aware, when he recanted his testimony, that the Government realized that he had testified falsely before the grand jury, and thus recantation of his testimony would not bar the prosecution. 18 U.S.C.A. §1623(d).

6. Perjury —15

The Government is not required to affirmatively act to inform a perjurer that his perjury is manifest. 18 U.S.C.A. §§ 1623, 1623(d).

7. Constitutional Law —265

Grand Jury —36.7

There is no constitutional requirement that the Government inform a grand jury witness that he is a potential defendant, nor does due process require that the Government warn a grand jury witness that he is a target of grand jury's investigation. U.S.C.A. Const. Amend. 5.

8. Constitutional Law —265

The Government is not required by due process principles to inform a grand jury witness of his statutory right to recant. 18 U.S.C.A. §1623(d), U.S.C.A. Const. Amend. 5.

9. Constitutional Law —265

The Government did not deprive defendant of due process of law by permitting defendant to recant his

grand jury testimony without warning him that his recantation would be to no avail because the Government intended to prosecute him for perjury whether or not he recanted it. 18 U.S.C.A. §1623(d); U.S.C.A. Const. Amend. 5.

Appeal from the United States District Court for the Southern District of Florida.

Before MORGAN, FAY and FRANK M. JOHNSON, Jr., Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

The Government appeals from the district court's dismissal of a five-count indictment charging William Scrimgeour with knowingly making false material declarations before a grand jury in violation of 18 U.S.C.A. §1623.[1] The district court granted Scrimgeour's motion to dismiss the indictment, ruling that prosecution was

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[1]18 U.S.C.A. §1623 provides in pertinent part:

> (a) Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . .

barred by the recantation provision of 18 U.S.C.A. §1623(d).[2]

Scrimgeour made material declarations under oath before a grand jury and subsequently reappeared and admitted those declarations to be false. He first testified before the grand jury, which was investigating price fixing in the southern Florida bond paper market, on June 16, 1977. His testimony contradicted that given by a prior witness, David Boynton, who had testified that Scrimgeour attended price fixing meetings. For that reason, Scrimgeour was twice warned by the Government attorney of the penalty for perjury and given an opportunity to change his answers. Scrimgeour declined at that time to change his testimony. On July 27, 1977, Michael Nachwalter, Scrimgeour's attorney at that time, contacted a Government attorney concerning Scrimgeour's possible perjury and requested that the Government provide a copy of Scrimgeour's grand jury testimony. That request was refused on the ground that grand jury proceedings are secret under Fed.R. Crim. P. 6(e). On August 12, 1977, Nachwalter again requested that the Government attorneys allow Scrimgeour to view a transcript of his testimony, but

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[2]18 U.S.C.A. §1623(d) provides in pertinent part:

> (d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

the Government again refused on the ground that a court order would be required under Rule 6(e).

On September 15, 1977, another witness, Joe Lincks, reappeared before the grand jury and testified, in contradiction to Lincks' prior testimony given in March 1977, that Scrimgeour had attended price fixing meetings. A few hours after Lincks testified on September 15, Scrimgeour's counsel called a Government attorney and stated that he knew that Lincks had been a "songbird" before the grand jury. In October 1977, Scrimgeour's new attorney, James Hogan, contacted Government counsel and stated "that Scrimgeour had lied" and that he "wanted him to go back to the grand jury and straighten it out." Hogan also requested a copy of the grand jury transcript but the Government again refused on the ground that a court order would be required under Rule 6(e). Hogan then filed a motion to compel disclosure of the transcript, which was granted on November 7, 1977, after a hearing on that motion. At that hearing Hogan conceded that "even if we appear and recant under 1623 the Government can still indict him for perjury under 1621 and 1623 if they so wish . . . ." Later that day on November 7, Scrimgeour reappeared before the grand jury, admitted his prior false statements, and corrected his testimony.

The grand jury before which Scrimgeour made his false statements and then recanted expired in December 1977, without returning an indictment for price fixing. However, a second grand jury did return an indictment in September 1978, to which Scrimgeour and other defendants pleaded *nolo contendere.*

The district court dismissed the perjury indictment on the basis of 18 U.S.C.A. §1623(d), which provides that a person who recants or admits that he has made false declarations shall not be prosecuted for those declarations, "if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed." The district court held that "or" must be read in the disjunctive and not in the conjunctive, *i.e.*, if either of the two conditions of Section 1623(d) is satisfied, recantation bars prosecution. The district court decided in the alternative that both conditions were satisfied and thus prosecution of Scrimgeour was barred.

The United States Court of Appeals for the District of Columbia Circuit held in *United States v. Moore*, 613 F.2d 1029 (D.C. Cir. 1979), *cert. denied*, _ U.S. _ , 100 S.Ct. 2922, 64 L.Ed.2d 811 (1980), that the word "or" in 18 U.S.C.A. §1623(d) means "and." That court reviewed the legislative history of Section 1623 and concluded that Congress intended that a defendant be required to satisfy both conditions of subsection (d).[3] This Circuit specifically reserved this precise issue in *United States v. Beasley*, 550 F.2d 261, 266 (5th Cir.), *cert. denied*, 434 U.S. 863, 938, 98 S.Ct. 427, 54 L.Ed.2d 297 (1977).

We are persuaded by *Moore*. Our reading of the legislative history convinces us that the court in *Moore* was correct in determining that despite the formulation of Section 1623(d) grammatically, the intent of Congress

[3] 613 F.2d at 1039-40.

was that a defendant must satisfy both conditions of that subsection.[4]

The central purpose of Congress in enacting Section 1623 was to encourage truth telling to the maximum extent possible, at every step of the witness' testimony.[5] The *Moore* court turned to legislative history after determining that a literal interpretation of Section 1623(d) was unsatisfactory because it would frustrate Congress' overriding goal in enacting that section by allowing a perjurer to avoid prosecution by merely recanting before his perjury adversely affected the proceeding, even after his perjury had been exposed.[6]

Section 1623(d) was modeled on a New York statute[7] and congressional treatment of the recantation provision reveals that the New York version was basically incorporated into Section 1623(d).[8] The *Moore* court

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[4]For an exhaustive discussion of the legislative history of Section 1623(d), see *Moore, supra*, 613 F.2d at 1039-45.

[5]*See Moore, supra*, 613 F.2d at 1040, 1043.

[6]*Id.* at 1041.

[7]N.Y. Penal Law §210.25 (McKinney 1965).

[8]*Moore, supra*, 613 F.2d at 1042. During legislative hearings on the recantation provision of Section 1623(d), the Justice Department offered an interpretation of that section which expressly paralleled the conjunctive preconditions contained in the New York statute. *See id.* at 1042 & n. 130. However, certain remarks during the legislative hearing indicate that there was some awareness that the proposed recantation legislation differed from the New York statute. *See id.* at 1042 & n.107.

reasoned that Congress would not have enacted a version of the recantation statute which differed so greatly from the New York version without explaining its intent and reasons in so doing.[9] On the basis of its examination of the legislative history, the *Moore* court concluded that "Congress did not countenance in Section 1623(d) the flagrant injustice that would result if a witness is permitted to lie to a judicial tribunal and then, upon only learning that he had been discovered, grudgingly to recant in order to bar prosecution."[10]

[1, 2] We must keep in mind several basic principles that relate to the construction of criminal statutes: A federal criminal statute should be construed narrowly in order to encompass only that conduct that Congress so intended to criminalize. *Dunn v. United States*, 442

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[9]The court stated:

> Had so drastic a departure from the New York statute as a switch from combinational to alternative satisfaction of its carefully developed preconditions been really intended, we believe Congress would have said so. Had Congress actually intended a nearly complete overruling, in the practical sense, of the Supreme Court's longstanding pronouncement on the serious drawbacks of recantation in the quest for truth, we would expect a much fuller explanation. Had Congress, after making crystal clear its purpose to promote truthtelling to the hilt, intended the almost wide-open door to prevarication that disinjunctive [sic] construction of the statutory preconditions would furnish, it hardly would have failed to elucidate its logic.

613 F.2d at 1042-43.

[10]*Id.* at 1043.

U.S. 100, 112, 99 S.Ct. 2190, 2197, 60 L.Ed.2d 743 (1979); *United States v. Dudley*, 581 F.2d 1193, 1197 (5th Cir. 1978). Although a criminal statute must be strictly construed, it must not be construed so strictly as to defeat the clear intention of the legislature. *Barrett v. United States*, 423 U.S. 212, 218, 96 S.Ct. 498, 502, 46 L.Ed.2d 450 (1976); *Huddleston v. United States*, 415 U.S. 814, 831, 94 S.Ct. 1262, 1271, 39 L.Ed.2d 782 (1974); *United States v. Cook*, 384 U.S. 257, 262-63, 86 S.Ct. 1412, 1414-15, 16 L.Ed.2d 516 (1966). "The principle of strict construction 'does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.' " *United States v. Levy*, 579 F.2d 1332, 1337 (5th Cir. 1980), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1243, 59 L.Ed.2d 471 (1979), *quoting United States v. Bramblett*, 348 U.S. 503, 510, 75 S.Ct. 504, 508, 99 L.Ed. 594 (1955).

[3] A basic canon of statutory construction is that words should be interpreted as taking their ordinary and plain meaning. *E. g., Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199, 204 (1980). Although in interpretation of statutory language reference should first be made to the plain and literal meaning of the words, the overriding duty of a court is to give effect to the intent of the legislature. *Flora v. United States*, 357 U.S. 63, 65, 78 S.Ct. 1079, 1081, 2 L.Ed.2d 1165 (1958); *United States v. Second National Bank of North Miami*, 502 F.2d 535, 539 (5th Cir. 1974), *cert. denied*, 421 U.S. 912, 95 S.Ct. 1567, 43 L.Ed.2d 777 (1975). A statute should ordinarily be interpreted according to its plain language, unless a clear contrary legislative intention is shown, *United States v. Apfelbaum*, 445 U.S. 115, 121, 100 S.Ct. 948, 952, 63 L.Ed.2d 250, 257

(1980). Although words should ordinarily be given their plain and ordinary meaning, that meaning must be in accord with the intent of the legislature. *United States v. Cook, supra,* 384 U.S. at 262-63, 86 S.Ct. at 1414-15; *United States v. Mississippi Valley Co.*, 364 U.S. 520, 550, 81 S.Ct. 294, 309, 5 L.Ed.2d 268 (1961); *Rainwater v. United States*, 356 U.S. 590, 593, 78 S.Ct. 946, 949, 2 L.Ed.2d 996 (1958); *United States v. Corbett*, 215 U.S. 233, 242, 30 S.Ct. 81, 84, 54 L.Ed. 173 (1909); *United States v. Bryant*, 563 F.2d 1227, 1230 (5th Cir. 1977), *cert. denied*, 435 U.S. 972, 98 S.Ct. 1616, 56 L.Ed.2d 65 (1978). A court must construe a federal statute so as to give effect to the intent of Congress. *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9-10, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434 (1976); *Philbrook v. Glodgett*, 421 U.S. 707, 713, 95 S.Ct. 1893, 1898. 44 L.Ed.2d 525 (1975); *United States v. American Trucking Assns.*, 310 U.S. 534, 542, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1940); *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 18, 25 S.Ct. 158, 161, 49 L.Ed. 363 (1904); *Craig v. Finch*, 425 F.2d 1005, 1008 (5th Cir. 1970).

"A criminal statute should be fairly construed in accordance with the legislative purpose behind its enactment." *United States v. Levy, supra*, 579 F.2d at 1337, *citing United States v. Turley*, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957). *See Hattaway v. United States*, 304 F.2d 5, 8-9 (5th Cir. 1962). Criminal statutes are not to be interpreted in such a manner as to defeat or disregard the legislative purpose. *See United States v. Culbert*, 435 U.S. 371, 379, 98 S.Ct. 1112, 1116, 55 L.Ed.2d 349 (1978); *Barrett v. United States*, 423 U.S. 212, 218, 96 S.Ct. 498, 502, 46 L.Ed.2d 450 (1976); *United States v. Corbett, supra*, 215 U.S. at 242, 30 S.Ct. at 84.

The Supreme Court has given somewhat inconsistent instructions concerning the propriety of use of legislative history where the meaning of the words is plain on the face of the statute.[11] In *TVA v. Hill*, 437 U.S. 153, 184 n.29, 98 S.Ct. 2279, 2296 n.29 57 L.Ed.2d 117 (1978), the Court noted that, where the words of the statute are plain and unambiguous on the face of the statute, there is "ordinarily" no need to resort to legislative history. *See Ex parte Collett*, 337 U.S. 55, 61, 69 S.Ct. 944, 947, 93 L.Ed. 1207 (1949); *Glenn v. United States*, 571 F.2d 270, 271 (5th Cir. 1978). However, the Court has clearly held that consideration of legislative history is proper in determination of the meaning of words used in statutes, even where the meaning of the words appears to be plain. "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *Train v. Colorado Public Interest Research Group, Inc.*, *supra*, 426 U.S. at 10, 96 S.Ct. at 1942, *quoting United States v. American Trucking Assns.*, *supra*, 310 U.S. at 543-44, 60 S.Ct. at 1063-64.

The Supreme Court has looked beyond the plain meaning of the words used in a statute to the purpose of the act where that meaning produced an unreasonable result "plainly at variance with the policy of the legislation as a whole." *United States v. American Trucking Assns.*, *supra*, 310 U.S. at 543-44, 60 S.Ct. at 1063-64 (footnotes omitted). Where the policy of the act is at such variance with the plain meaning of the words of the statute, the

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[11] *See Church of Scientology v. United States Department of Justice*, 612 F.2d 417, 420-22 (9th Cir. 1979).

Court has followed the purpose of the statute rather than the literal words. *Id. See Medler v. United States, Bureau of Reclamation*, 616 F.2d 450, 453 (9th Cir. 1980); *Church of Scientology v. United States Department of Justice*, 612 F.2d 417, 422 (9th Cir. 1979); *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1313 (7th Cir. 1978).

The strict construction principle governing interpretation of criminal statutes "cannot provide a substitute for common sense, precedent and legislative history." *United States v. Standard Oil Co.*, 384 U.S. 224, 225, 86 S.Ct. 1427, 16 L.Ed.2d 492 (1966). The canon that penal statutes should be strictly construed "is not an inexorable command to override common sense and evident statutory purpose." *United States v. Cook, supra*, 384 U.S. at 262, 86 S.Ct. at 1414, *quoting United States v. Brown*, 33 U.S. 18, 25, 68 S.Ct. 376, 379, 92 L.Ed. 422 (1948).

Although as a general rule the use of a disjunctive in a statute indicates that alternatives were intended, *Quindlen v. Prudential Insurance Co. of America*, 482 F.2d 876, 878 (5th Cir. 1973), where a strict grammatical construction of the word "or" would frustrate legislative intent, "or" has been read to mean "and." *De Sylva v. Ballantine*, 351 U.S. 570, 76 S.Ct. 974, 100 L.Ed. 1415 (1956).[12] The Supreme Court has stated that "[c]anons of construction ordinarily suggest that terms connected

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[12]*See, e. g., Travelers Ins. Co. v. Norton*, 24 F.Supp. 243, 246 (S.D.N.Y. 1938). Conversely, the word "and" has been read to mean "or." *E. g., Union Central Life Ins. Co. v. Skipper*, 115 F.69, 72 (8th Cir. 1902); *United States v. Cumbee*, 84 F.Supp. 390, 391 (D.Minn. 1949); *United States v. Mullendore*, 30 F.Supp. 13, 15 (N.D.Okl. 1939), *app. dismissed*, 111 F.2d 898 (10th Cir. 1940).

by a disjunctive be given separate meanings, unless the context dictates otherwise . . . ." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979).

The recantation provision of Section 1623(d) is an exception to the remaining subsections of Section 1623. The rule of strict construction also applies to exceptions or provisions of a criminal statute which exempt conduct otherwise within a statute and the exception is to be strictly construed against the defendant seeking to invoke its protection. *United States v. Scharton*, 285 U.S. 518, 521-22, 52 S.Ct. 416, 417, 76 L.Ed. 917 (1932); *Moore, supra*, 613 F.2d at 1044-45. *See United States v. An Article of Drug . . . "Bentex Ulcerine,"* 469 F.2d 875, 878 (5th Cir. 1972), *cert. denied*, 412 U.S. 938, 93 S.Ct. 2772, 37 L.Ed.2d 397 (1973). The defendant must show that he is within an exception. *McKelvey v. United States*, 260 U.S. 353, 356-57, 43 S.Ct. 132, 133-34, 67 L.Ed. 301 (1922); *Green, Moore & Co. v. United States*, 19 F.2d 130, 131 (5th Cir.), *cert. denied*, 275 U.S. 549, 48 S.Ct. 86, 72 L.Ed. 420 (1927).

[4] The conjunctive reading of Section 1623(d) comports with accepted principles of statutory construction and is supported by the underlying congressional intent. We have determined that Congress did not intend to allow a perjurer to avoid prosecution by merely recanting before his perjury adversely affected a grand jury proceeding, even after his perjury had already been exposed. Therefore, we hold that recantation bars prosecution only when the defendant has satisfied both conditions of Section 1623(d).

The district court found that the second condition of Section 1623(d) — "it has not become manifest that such falsity has been or will be exposed" — was satisfied by Scrimgeour. The district court seemed to suggest that Scrimgeour had no awareness that his lies had been or would be exposed to the Government because the Government attorneys never revealed to Scrimgeour that they believed that his testimony was false and never informed him that they were considering bringing a perjury indictment against him. The court also reasoned that there was a basic inconsistency in the Government's position that perjury was manifest, and its attempts to prevent Scrimgeour from obtaining his testimony and its lack of communications to Scrimgeour concerning its intention to prosecute him for perjury.

[5] On the basis of our review of the record, we conclude that the district court erred to the extent of 180 degrees in its determination that Scrimgeour was not aware when he recanted on November 7, 1977, that the Government realized that he had testified falsely before the grand jury.

Scrimgeour was twice warned during the June 16, 1977, proceeding in which he testified falsely that there were severe penalties for perjury and was given the opportunity to then change his testimony. In July Scrimgeour's attorney contacted Government counsel and mentioned Scrimgeour's possible perjury. Only a few hours after one witness, Lincks, testified in September, Scrimgeour's attorney called a Government attorney and stated that Scrimgeour knew that Lincks had been a "songbird" before the grand jury. During that conversation, Scrimgeour's attorney stated that it

was unfair to immunize culpable individuals "and then indict smaller fish like Bill Scrimgeour . . . ." Additionally, at the hearing on the motion to disclose the grand jury transcript, which was held earlier on the same day that Scrimgeour reappeared before the grand jury, Scrimgeour's counsel acknowledged the possibility of a perjury indictment and the Government attorney stated that Scrimgeour was a target of the grand jury's investigation.

Knowledge that an antitrust indictment was probable demonstrates Scrimgeour's awareness that the Government had evidence that directly contradicted his false testimony. Further, Scrimgeour's attorney's statement to Government counsel about a possible perjury indictment manifests that Scrimgeour's false testimony had been exposed to the Government.

The Government was under no obligation to furnish Scrimgeour with a copy of his transcript. Indeed, a court order is required under Fed.R.Crim. P. 6(e) for

disclosure by the Government of a grand jury transcript.[13] Scrimgeour's lack of access to his grand jury transcript until the day of his reappearance is not inconsistent

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[13]Fed.R.Crim. P. 6(e) provides in pertinent part:

> (2) [A]n attorney for the government . . . shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules . . . .
>
> (3) Exceptions. [Subsections (A) and (B) refer to disclosure to government attorneys and personnel].
>
> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or
>
> (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.
>
> If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

This Court has assumed that a court order is a prerequisite for disclosure of a grand jury transcript by the Government to declarants. *United States v. Fuentes*, 432 F.2d 405, 408 (5th Cir. 1970), *cert. denied*, 401 U.S. 919, 91 S.Ct. 904, 27 L.Ed.2d 822 (1971). "The decision whether to disclose grand jury testimony is committed to the sound discretion of the trial court." *Id.* The Government relied repeatedly on Fed.R.Crim. P. 6(e) in declining to release the transcript of Scrimgeour's testimony. Scrimgeour's counsel indicated to the Government an awareness that he could file a motion for an order compelling disclosure of the transcript.

with the purposes of Section 1623(d). The lack of a transcript does not frustrate the purposes of that section. *United States v. Clavey*, 578 F.2d 1219 (7th Cir. 1978) (per curiam) (en banc), *vacating* 565 F.2d 111 (7th Cir. 1977), *cert. denied*, 439 U.S. 954, 99 S.Ct. 351, 58 L.Ed.2d 345 (1978) (affirming, without en banc opinion because of equally divided en banc court, district court opinion which held that a district court's refusal to release to a defendant a transcript of his grand jury testimony did not bar prosecution under a Section 1623(d)).

[6] The Government is not required to affirmatively act to inform a perjurer that his perjury is manifest.[14]

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[14]It has been argued that a prosecutor unfairly limits a declarant's ability of recanting by making his perjury manifest as soon as it is given. *United States v. Del Toro*, 513 F.2d 656, 666 (2d Cir.), *cert. denied*, 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975).

[15]*United States v. Swainson*, 548 F.2d 657, 663 (6th Cir.), *cert. denied*, 431 U.S. 937, 97 S.Ct. 2649, 53 L.Ed.2d 255 (1977) (witness heard transcript of two contradicting witnesses); *United States v. Del Toro*, 513 F.2d 656, 665-66 (2d Cir. 1975) (defendant was warned that he was a grand jury target and that he might be subject to a perjury prosecution); *United States v. Mazzei*, 400 F. Supp. 17, 19 (W.D.Pa. 1975) (Government advised defendant that it considered answers untrue and would seek perjury indictment); *United States v. Mitchell*, 397 F.Supp. 166, 176-77 (D.D.C.), *aff'd sub nom. United States v. Haldeman*, 559 F.2d 31 (1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977) (Government informed defendant that, based on testimony of witnesses who appeared subsequent to defendant's appearance, defendant was grand jury target); *United States v. Crandall*, 363 F.Supp. 648, 655 (W.D.Pa. 1973), *aff'd without opinion*, 493 F.2d 1401, 495 F.2d 1368, 1369 (3d Cir.), *cert. denied*, 419 U.S. 852, 95 S.Ct. 94, 42 L.Ed.2d 83 (1974) (Government showed defendant draft indictment on underlying offense).

Developments other than direct confrontation by the Government can make exposure manifest. *See United States v. Krogh*, 366 F.Supp. 1255, 1256 (D.D.C. 1973). Although the manifest element may have been more explicit in some cases involving this issue, none of those cases mandate affirmative Government action to inform the defendant that exposure is manifest.[15]

Because we hold that a defendant must satisfy both conditions of Section 1623(d) in order to be protected from prosecution for perjury, and that Scrimgeour failed to satisfy the second condition, we do not reach the issue whether, at the time Scrimgeour recanted, his false testimony had substantially affected the grand jury proceeding.

Scrimgeour argued to the district court that his indictment should be dismissed on the ground of violation of due process, but the district court found it unnecessary to resolve this issue in light of its conclusion that prosecution was barred by Section 1623(d). The district court stated that it had serious reservations about the fairness of the Government's action in permitting Scrimgeour to recant without warning him that his recantation would be to no avail because the Government intended to prosecute him for perjury whether or not he recanted. The court reasoned that the purpose of Section 1623(d)—including recantation of false testimony—would be frustrated if a witness could expressly invoke that section and yet still be prosecuted. Finally, the court stated that "[i]f the government wants the benefit of recanted testimony pursuant to 1623(d), it must pay the statutory price and forego prosecution.

[7] There is no constitutional requirement that the Government inform a grand jury witness that he is a potential defendant. *United States v. Washington*, 431 U.S. 181, 186-89, 97 S.Ct. 1814, 1818-20, 52 L.Ed.2d 238 (1977). Nor does due process require that the Government warn a grand jury witness that he is a target of the grand jury's investigation. *United States v. Crocker*, 568 F.2d 1049, 1053-56 (3d Cir. 1977). In *Crocker* the Government misled the defendant by telling him that he was *not* a target of the investigation, yet the perjury indictment was held to be valid despite a due process challenge. *Crocker* relied on two Supreme Court cases, *United States v. Wong*, 431 U.S. 174, 97 S.Ct. 1823, 52 L.Ed.2d 231 (1977), and *United States v. Washington, supra*, 431 U.S. at 181, 97 S.Ct. at 1814, stating that those cases "rejected the contention that there was a due process obligation to do anything more than inform the witness of the dangers of testifying falsely by administering an oath." 568 F.2d at 1055.[16]

[8] The Government is not even required by due process principles to inform a grand jury witness of his statutory right to recant. *See United States v. Crocker, supra*, 568 F.2d at 1055-56; *United States v. Anfield*, 539 F.2d 674, 679 (9th Cir. 1976); *United States v. Lardieri*, 497 F.2d 317, 321 (3d Cir. 1974), *on rehearing, remand withdrawn and judgment affirmed*, 506 F.2d 319 (1974); *United States v. Cuevas*, 510 F.2d 848, 851-52 (2d Cir. 1975).

---

[16] *Wong* held that a grand jury witness under investigation who was later indicted for perjury was not entitled to be warned of her Fifth Amendment privilege prior to her grand jury testimony.

Scrimgeour's attorney acknowledged to Government attorneys at the hearing on the motion to compel disclosure of the grand jury transcript that Scrimgeour could be indicted for perjury "even if we appear and recant . . . ." This statement demonstrates that Scrimgeour was aware that his recantation might be to no avail, *i.e.*, that Section 1623(d) is not an automatic bar to prosecution for perjury.

[9] We conclude that the Government did not deprive Scrimgeour of due process of law. Because Scrimgeour failed to satisfy the conditions of Section 1623(d) and since he was not denied due process, dismissal of the indictment was erroneous.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

March 16, 1981

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 80-5205

UNITED STATES OF AMERICA

-vs-

WILLIAM C. SCRIMGEOUR

(District Court No. 79-20-CR-WMH)

The following action has this day been taken in the above case;

☐ AN EXTENSION OF TIME has been granted to and including

☐ for filing appellant's/petitioner's brief.

☐ for filing appellee's/respondent's brief.

☐ for filing reply brief.

☐ for filing petition for rehearing.

☐ Motion to consolidate granted.

☐ Motion to supplement or correct the record granted.

☐ Motion for leave to file supplemental brief granted.

☐ Motion for leave to file brief *amicus curiae* is granted.

☐ Joint motion as to time for filing briefs granted.

☒ Order enclosed has been entered.

☐

GILBERT F. GANUCHEAU, Clerk

cc: Mr. John J. Powers, III
Mr. Joseph Mincbert

BY: /s/ Laura M. Young
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 80-5205

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

WILLIAM C. SCRIMGEOUR,
Defendant-Appellee.

U.S. COURT OF APPEALS
FILED
MAR 16 1981
GILBERT F. GANUCHEAU
CLERK

Appeal from the United States District Court for the Southern District of Florida

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC
(Opinion 2/12/81, 5 Cir., 198____ , ____ F.2d ____).

(March 16, 1981)

Before MORGAN, FAY, and FRANK M. JOHNSON, JR., Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc is DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petitions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ (copy illegible)
United States Circuit Judge

CLERK'S NOTE:
(copy illegible) 41 PRAP AND LOCAL FILE 17 FOR STAY OF THE MANDATE

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

March 26, 1981

Mr. Joseph I. Bogart, Clerk
U.S. District Court
P.O. Box 010669
Flagler Station
Miami, FL 33101

NO. 80-5205

UNITED STATES OF AMERICA

vs.

WILLIAM C. SCRIMGEOUR

(D. C. No. 79-20-CR-WMH)

Dear Mr. Bogart:

(X) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Enclosed is a certified copy of the Rule 21 Decision in the above case issued as and for the mandate.

( ) The Court having denied the motion for stay of mandate, enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate. *See attached notice.*

( ) Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(X) Copy of the Court's opinion.

( ) Original record on appeal or review. (TO BE RETURNED LATER)

(X) Original exhibits. (1 box-under sep. cover) (1 env. to be returned later)

( ) Bill of Costs approved by this Court.

Sincerely,

GILBERT F. GANUCHEAU, Clerk

By /s/ Brenda Hauck
Deputy Clerk

Encl.

cc: Messrs. John J. Powers, III
Peter De La Cruz
Mr. Joseph Mincberg

Office-Supreme Court, U.S.
FILED
AUG 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1957

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM C. SCRIMGEOUR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

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QUESTION PRESENTED

Whether petitioner's admission that his previous grand jury testimony was false barred his prosecution for false statements under the recantation provision of 18 U.S.C. 1623(d).

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 636 F. 2d 1019.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1981 (Pet. App. 1), and a petition for rehearing was denied on March 16, 1981 (Pet. App. 24-25). The petition for a writ of certiorari was filed on May 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On January 11, 1979, petitioner was indicted in the United States District Court for the Southern District of Florida on five counts of knowingly making false material declarations before a grand jury, in violation of 18 U.S.C. 1623. On petitioner's motion, the district court dismissed the

indictment, holding that prosecution was barred by the recantation provision of the statute, 18 U.S.C. 1623(d), which provides that a person who admits that he has made false declarations will not be prosecuted for those declarations "if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed." The court of appeals reversed and remanded for trial (Pet. App. 4-5, 21).

1. The factual context of petitioner's indictment is described in the opinion of the court of appeals (Pet. App. 4-7). Briefly, a grand jury in the Southern District of Florida was convened in 1976 to investigate price fixing in the southern Florida bond paper market (*id.* at 5). Petitioner, the general manager of Southern Paper Company, first testified before the grand jury on June 16, 1977 (*ibid.*). Prior to petitioner's initial grand jury appearance, David Boynton, the division manager of Virginia Paper Company, had revealed to government attorneys that petitioner had attended price fixing meetings (*ibid.*). However, petitioner testified before the grand jury that no one had discussed prices at the meetings described, and he refused to change his testimony even after he had twice been warned of the penalty for perjury (*ibid.*).[1]

On July 27, 1977, Michael Nachwalter, who was then the attorney for petitioner and Southern Paper Company, contacted a government attorney concerning petitioner's possible perjury and requested a copy of his grand jury testimony (Pet. App. 5). This request was refused on the ground that grand jury proceedings are secret under Fed. R.

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[1] Prior to his testimony, petitioner was advised of his rights (R. 26-28). He stated that he was represented by counsel for Southern Paper Company, but further stated that he had not informed counsel that he had been subpoened (R. 27).

Crim. P. 6(e) (Pet. App. 5). A written request for a copy of the transcript was later denied by government counsel on August 17, 1977, on the ground that disclosure was prohibited absent a court order (*id.* at 5-6).

In the meantime, the grand jury investigation made no progress until September 15, 1977, when Joe Lincks, the branch manager of MAC Papers, Inc., appeared before the grand jury. Lincks testified, in contradiction to earlier testimony that he had given in March 1977, that petitioner had attended price fixing meetings (Pet. App. 6). A few hours after Lincks had testified, petitioner's counsel called a government attorney and stated that he knew that Lincks had been a "songbird" (*ibid.*).

In October 1977, petitioner's new attorney, James Hogan, stated to government counsel "that Scrimgeour had lied" and that he "wanted him to go back to the grand jury and straighten it out" (Pet. App. 6). After the government again refused petitioner's request for a copy of the grand jury transcript without a court order, Hogan moved to compel disclosure of the transcript (*ibid.*). After a hearing on the motion, disclosure was granted on November 7, 1977. Hogan conceded at the hearing that "even if we appear and recant under 1623 the Government can still indict [Scrimgeour] for perjury under 1621 and 1623 if they so wish * * *" (*ibid.*). On the same day, petitioner appeared again before the grand jury and read a prepared statement, in which he admitted that his prior statements were false and corrected his former testimony (*ibid.*).[2]

In December 1977, the month following petitioner's recantation, the grand jury expired without returning an indictment for price fixing (Pet. App. 6). In September

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[2]When petitioner was questioned at the conclusion of his prepared statement, he invoked his Fifth Amendment privilege against self-incrimination (R. 109-110).

1978, a second grand jury returned price fixing indictments, to which petitioner and other defendants pleaded *nolo contendere* (*ibid.*). On January 11, 1979, the second grand jury also returned the present indictment charging petitioner with knowingly making false material declarations in violation of 18 U.S.C. 1623.

2. The district court dismissed the indictment. The court first concluded (Pet. App. 7) that a witness successfully recants prior false testimony if he satisfies either of the two conditions specified in 18 U.S.C. 1623(d). Turning to the particular facts of this case, the district court then concluded that petitioner had satisfied both conditions (Pet. App. 7).[3]

The court of appeals reversed. Relying on the District of Columbia Circuit's analysis of the legislative history of 18 U.S.C. 1623(d) in *United States* v. *Moore*, 613 F. 2d 1029, 1039-1045 (1979), cert. denied, 446 U.S. 954 (1980), the court of appeals concluded (Pet. App. 14) that a witness may not successfully recant prior false testimony unless he satisfies both statutory conditions. The court of appeals held (*id.* at 15-16) that petitioner had not successfully recanted his testimony within the meaning of the statute because he had failed to satisfy the requirement that recantation occur before it becomes manifest that the prior false testimony "has been or will be exposed." Thus, petitioner's prosecution for making false statements was not barred by the recantation provision of 18 U.S.C. 1623(d).

ARGUMENT

Petitioner contends (Pet. 4-7) that the court of appeals erred in holding that both statutory preconditions, that the

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[3]The district court also suggested that dismissal of the indictment was warranted on due process grounds because the government allowed petitioner to recant his testimony without warning him that a perjury indictment would be sought. The court of appeals rejected this finding (Pet. App. 20-21), and petitioner has not raised this issue in his petition.

false testimony has not substantially affected the proceeding and that it has not become manifest that the falsity of the statement has been or would be exposed, must be satisfied before a witness can invoke the recantation provision as a bar to prosecution under 18 U.S.C. 1623. This claim was properly rejected by the court below. Moreover, this Court has only recently declined to review this question in *United States* v. *Moore*, 613 F. 2d 1029 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980). There is no conflict among the circuits, and further review is therefore unwarranted.

1. We note at the outset that the decision of the court of appeals places petitioner in the same position that he would have been in if the district court had denied his motion to dismiss, in which case petitioner would have had no right to an interlocutory appeal. Review by this Court is unnecessary at the present juncture because petitioner has not yet been tried. In the event that he is acquitted, the issue that he seeks to raise here will be moot. On the other hand, if he is convicted and his conviction is affirmed, he will again be able to seek review in this Court with respect to this and any other issue that he might have. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

2. At all events, the court below correctly held that a witness must meet both conditions set forth in Section 1623(d) if he is to benefit from the bar to prosecution established in this section. Although the statute uses the word "or" to connect the two preconditions, the court of appeals properly determined that the clear legislative intent of the section requires that the two preconditions be read in the conjunctive.

Section 1623 was enacted to encourage witnesses to testify truthfully before courts and grand juries. To accomplish this purpose, Congress facilitated perjury prosecutions by eliminating rigid common-law requirements such as the two-witness and direct-evidence rules, thereby lowering the

government's burden of proof. See 18 U.S.C. 1623(e); S. Rep. No. 91-617, 91st Cong., 1st Sess. 57-59 (1969).[4] At the same time, Congress saw fit to include as part of the statutory scheme a limited right to retract prior false testimony. H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 47-48 (1970). This provision, permitting recantation, was based on New York law (N.Y. Penal Law § 210.25 (McKinney 1965)), which allows recantation only if it occurs before the falsehood substantially affects the proceeding *and* before it becomes manifest that the falsity will be exposed. See *People* v. *Ezaugi*, 2 N.Y.2d 439, 141 N.E.2d 580, 161 N.Y.S.2d 75 (1957). Despite Congress' avowed intention to follow the New York statute (see S. Rep. No. 91-617, *supra*, at 150; H.R. Rep. No. 91-1549, *supra*, at 47-48), it nevertheless placed the word "or" between the two preconditional clauses, rather than the word "and" used in the New York law. However, as the District of Columbia Circuit recognized in *United States* v. *Moore*, *supra*, 613 F. 2d at 1042-1043, this unexplained change was clearly not intended to work the dramatic departure from New York law that petitioner suggests (see Pet. 4-7). In *Moore*, the court noted (613 F. 2d at 1042-1043; footnotes omitted):

> Had so drastic a departure from the New York statute as a switch from combinational to alternative satisfaction of its carefully developed preconditions been really intended, we believe Congress would have said so. Had Congress actually intended a nearly complete overruling, in the practical sense, of the Supreme Court's longstanding pronouncement on the serious drawbacks of recantation in the quest for truth, we

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[4]The Senate Report states (S. Rep. No. 91-617, *supra*, at 58, quoting a 1967 report of the President's Crime Commission) that " '[l]essening of rigid proof requirements in perjury prosecutions would strengthen the deterrent value of perjury laws and present a greater incentive for truthful testimony.' "

> would expect a much fuller explanation. Had Congress, after making crystal clear its purpose to promote truthtelling to the hilt, intended the almost wide-open door to prevarication that disinjunctive construction of the statutory preconditions would furnish, it hardly would have failed to elucidate its logic.

Congress certainly did not intend to foster a situation in which a perjurer could effectively bar his prosecution once his false testimony had been discovered merely by admitting to the falsity of that which the government already knew to be false. Yet this would be the result of a disjunctive reading of the statute. In these circumstances, the court below was correct in reading the statute in light of its legislative history and commonsense meaning. See *United States* v. *Culbert*, 435 U.S. 371, 379 (1978); *Barrett* v. *United States*, 423 U.S. 212, 218 (1976); *United States* v. *Standard Oil Co.*, 384 U.S. 224, 225 (1966); see also *De Sylva* v. *Ballentine*, 351 U.S. 570, 573 (1956) ("or" read as "and"); *United States* v. *Earth Sciences, Inc.*, 599 F. 2d 368, 375-376 (10th Cir. 1979) (same); *Association of Bituminous Contractors* v. *Andrus*, 581 F. 2d 853, 862 (D.C. Cir. 1978) (same); *Union Insurance Co.* v. *United States*, 73 U.S. (6 Wall.) 759, 764 (1867) (same); *United States* v. *Fisk*, 70 U.S. (3 Wall.) 445, 447 (1865) (same). The conjunctive reading of "or" is both grammatically permissible and reasonable in Section 1623(d)'s context of defining an exception to the offense.[5] The court's reading of the statute also comports with the maxim that exceptions to statutes should be construed narrowly. *United States* v. *Scharton*, 285 U.S. 518, 521-522

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[5]The question presented concerns the construction of a section carving out an exception to a substantive offense, not the section stating the substantive offense. Thus, there can be no argument here that 18 U.S.C. 1623(d) must be given the interpretation petitioner urges, despite the compelling indications of congressional intent to the contrary, in order to avoid the possibility of punishing someone who did know what the law proscribed. Here, petitioner's testimony clearly violated 18 U.S.C. 1623(a).

(1932); *Great Atlantic & Pacific Tea Co.* v. *FTC*, 106 F. 2d 667, 674 (3d Cir. 1939), cert. denied, 308 U.S. 625 (1940); see also *United States* v. *An Article of Drug . . . "Bentex Ulcerine,"* 469 F. 2d 875, 878 (5th Cir. 1972), cert. denied, 412 U.S. 938 (1973).

3. It is also clear, as a matter of fact, that petitioner did not satisfy either precondition to invoking the protection afforded by 18 U.S.C. 1623(d). As the court of appeals found, it had become manifest to the petitioner prior to his attempted recantation that his testimony before the grand jury was known to be false and would be exposed (Pet. App. 16-18).[6] During the June 16, 1977, grand jury proceeding in which petitioner testified falsely, he was twice warned about the severe penalties for perjury, and he was given an opportunity to change his testimony (*id.* at 5). Petitioner's attorney mentioned his possible perjury in a conversation with government counsel in July 1977 (*ibid.*), and petitioner's attorney told government counsel in September 1977 that petitioner knew that Lincks had been a "songbird" (*id.* at 15). At the hearing on the motion to disclose the grand jury transcript, petitioner's new attorney noted the possibility of a perjury indictment when he remarked that even if petitioner reappeared and recanted before the grand jury, "the Government can still indict him for perjury under 1621 and 1623 if they so wish * * *" (*id.* at 6). At the same hearing, government counsel stated that petitioner was a target of the grand jury's investigation (*id.* at 16). Petitioner was therefore aware that the government had evidence that directly contradicted his false testimony, and the statements made by petitioner's attorney, concerning a possible perjury indictment, confirmed that it had become manifest that petitioner's falsity had been exposed (*ibid.*).

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[6]Petitioner does not seek review of the finding of the court of appeals that it had become manifest that the falsity of his testimony had been exposed.

Petitioner's false testimony also substantially affected the grand jury investigation. Five months elapsed between petitioner's false testimony and his admission that this testimony was false (Pet. App. 5-6). When petitioner reappeared before the grand jury, only one month remained in the term of the grand jury. The lapse of time is a critical element in estimating the "substantial affect" of a false declaration. *United States* v. *Crandall*, 363 F. Supp. 648, 654-655 (W.D. Pa. 1973), aff'd without opinion, 493 F. 2d 1401, 495 F. 2d 1369 (3d Cir.), cert. denied, 419 U.S. 852 (1974) (attempted recantation untimely because of two-month delay); see also *People* v. *Ezaugi*, *supra*, 2 N.Y.2d at 443, 141 N.E.2d at 583, 161 N.Y.S. 2d at 78 (court emphasized the importance of a prompt recantation). The lengthy delay in this case was clearly sufficient to affect the proceedings substantially. See *United States* v. *Crandall*, *supra*, 363 F. Supp. at 654-655.[7] Moreover, petitioner's original testimony, if it had been truthful, would have helped to narrow the focus of the investigation, even if it had not resulted in an immediate indictment. Instead, his false testimony contradicted Boynton's testimony, the only testimony then available concerning price fixing. As a result, the government was required to prolong the investigation in an attempt to resolve the conflict in testimony. Thus, petitioner's false testimony contributed directly to the need for a second grand jury. To hold a that deliberate misleading of a grand jury that is not corrected until five months later does not produce a substantial affect would frustrate the purpose

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[7]Furthermore, petitioner did not request a court order to obtain access to the transcript until five months after his false testimony, although the government correctly refused to disclose the transcript without such an order, and petitioner's counsel understood that he could move the district court to order the government to disclose the transcript (GX 1 at 2). See Fed. R. Crim. P. 6(e).

of the statute to encourage truthful testimony at all times by every witness. *United States* v. *Moore, supra*, 613 F. 2d at 1043.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1981

DOJ-1981-08